In the United States Circuit Court of Appeals for the Ninth Circuit

TACOMA RAILWAY AND POWER COMPANY, a corporation,
Plaintiff in Error,
vs.
WILLIAM COTHARY and MARGARET COTHARY,
Defendants in Error.

No. 2736

BRIEF OF PLAINTIFF IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

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STATEMENT OF THE CASE.

This action was brought by the defendants in error to recover damages for injuries sustained by Margaret Cothary by being struck by a street car while attempting to pass through a turnstile on the private right of way of the plaintiff in error at Point Defiance Park, City of Tacoma, Washington, on Sunday, July 20th, 1913.

We call the Court's attention at this time to the photographs introduced in this case as exhibits, and particularly Exhibits A, B, C and E, which show the track and turnstile in the condition they were in at the time of the accident. Exhibit B shows the position occupied by Mrs. Cothary at the time she was injured, standing close to the tracks. Mrs. Cothary and Mr. and Mrs. Helander, the other two persons shown in Exhibit B, were visiting Point Defiance Park, and, desiring to visit the bathhouse, a portion of which is shown in Exhibit B, they walked across the park to a little path through some scotch broom, which is shown as Exhibit C, and which path was at the end of the wire fence enclosing the right of way of the tracks. Under the ordinance permitting the construction of the street car tracks it was provided that:

> "At the terminus or loop of said railway and for a distance along the main line to be agreed upon by said railway company and the Board of Park Commissioners, the said railway company shall construct and maintain a wire fence six feet high with suitable gates and turnstiles for the protection of the public in getting on or off the cars." (R., p. 43.)

After going down this path, they walked on the track towards the bathhouse, and attempted to pass through the turnstile. Mr. Helander was then ahead, and Mrs. Cothary next to him. When the

turnstile failed to permit them to pass through to the bathhouse they stepped back, intending to try to push the turnstile in the opposite direction, and Mrs. Helander got to the position shown in Exhibit B, she being the woman with the white scarf around her head, and Mrs. Cothary stepped back towards the track and took hold of the bar, all of this occupying but a moment, and just as she got ready to push she was struck by a street car coming into the park.

Mrs. Cothary and Mr. and Mrs. Helander all testified that they had been at the turnstile but a few moments, and that Mrs. Cothary had no sooner stepped from the place of safety she had first occupied to take a hold of the end of the bars of the turnstile, as shown in Exhibit B, than she was struck by the car. Her own testimony is as follows:

> "* * * The arrow points down to the man standing in the path, who is my husband. And when we were going down that path, I saw a car going into the park * * * I think we walked down on the track nearest to the bathhouse, but I couldn't say, on our way to the bathhouse. * * * While we walked from the path, I think we all walked along side by side, and when we got to the platform Mr. Helander tried to open the gate, he was ahead. I was right behind him. He went a little further through. That is turning in to about there (indicating), and he went through as far as he could and I was right behind him. Mr. Helander was a little bit further through the turnstile, and

I was where Mr. Helander was at one time when we were trying to get in. Mrs. Helander was behind me. I could not tell how close to the track I was, I was trying to get through there and trying to turn that around. I supposed it was a safe place to be and I supposed I could hear a car going, but I didn't. Yes, I was paying attention, I was going to go right through the gate. When we found the gate would not revolve that way we were all trying to work it loose when I got hurt. We were going through first, one back of the other, and in the line we occupied in this position (indicating). We next tried to start to go out and I started to back up to give Mr. Helander room and Mrs. Helander got in there (indicating on Exhibit B), and I got in this position (indicating on Exhibit B), something like that. *And very soon after I got in that position I was struck;* I couldn't say how soon, but we were pushing towards the gate back and forth when it struck me. *We were not there very long altogether. We didn't wait at all,* we had no conversation over it only he said that he could go through the other way, and so I stood back to help push. I was pushing on this (indicating). * * * I had my left foot back just pushing, and it was a little further than is shown in the photograph, as I could never get my foot so far since the accident and Exhibit B fails to show my foot back as far as it was, and I couldn't say that when I had hold of the brace of this turnstile that I was standing with my arms back as far from it as shown in the photograph, but I know it was far enough that the car hit me. * * * *I was there for just*

a short time; I was expecting to go right through the gate and did not look back again. I didn't know I could not get through the gate; I was trying to get through the other way. I did not see the bars sticking out like your fingers; Mrs. Helander was ahead of me and I didn't see the bars. The bars are shown in Exhibit E, but I didn't see them there that night. The turnstile only permitted one to go through on the right-hand side, as I understood after the accident. *I didn't pay any attention to the distance that my body was from the railroad track as I stood there, because I expected to go through the gate. I was there a very short time.* We were not pushing very long when it occurred. The inside of my left knee was certainly struck by the street car. * * * When the street car struck me no part of my body was struck by the turnstile." (R., pp. 22-26.)

Oscar Helander testified to practically the same facts as did Mrs. Cothary, to-wit:

"* * * We went down on to the tracks, the inside track, and followed that to the platform, and as soon as we struck the platform, we went right to the gate. I was leading and when I came to the gate, it stuck. My wife came right behind, and she went on the other side of the gate and said, 'Let us try it the other way,' and then Mrs. Cothary got between us, in front of the turnstile; so we got it a quarter of the way around, that was all we could do. We could not get it in from there; *it was impossible to get it open enough to go through, and the moment we got together there the car came. I heard a whistle, and the same moment it struck*

her. * * * *After we had reached the platform we didn't look to see whether there was a car coming;* we proceeded right ahead; some distance before we struck the platform we looked. I thought it was perfectly safe there, and went the first thing to the gate. We were not expecting to stop on the platform at all.

"* * * The platform extends ten or twelve feet in fact towards the loop, down towards the main part of the park and towards the bathhouse. At the time of the accident the turnstile was almost at the end of the platform, there was a place to stand there. I don't know for how many people, but there was plenty of room for one person. Exhibit E shows there is room enough for two persons to stand there, and from Exhibit B it looks as if my wife had her feet at the very edge of the platform as she pushed there. When we were on the knoll we saw a car going by and when we went down on the path we went down on the track. * * * *When we looked back before we got to the platform we looked up along the track. We were then about fifty feet away from the platform. From that time on we didn't look again and we went right to the platform and when we got on the platform we were certain that we were safe.* The first thing we did when we got on the platform was to start for the gate to go through the gate. Mrs. Helander and Mrs. Cothary were following me. They were pretty close behind me. My wife went to the other side of the turnstile. After my wife got around the turnstile Mrs. Cothary got in front of her. She walked around that to the car track and in front of the bars there. *She had not been*

there more than a moment before the car struck her, just about the time she got there, the car struck her. She stood right in front of the turnstile. *She didn't walk, she stood and pushed on those bars. She didn't keep that same position any more than a second, I suppose, just as she got there.* When I first went to push through the turnstile they both stood back of me. I didn't look back to see exactly how they stood, but as soon as I found out that we could not get through I told them that the turnstile was stuck and my wife walked to the other side and Mrs. Cothary went in front of the turnstile and just about the time she got there she was struck. Before we got to the turnstile, I suppose the car was on the way down grade. *I don't know how close Mrs. Cothary stood to the track before she got in front of the turnstile. I heard two toots of the whistle just about the time she was struck and it was just a short time before that she walked to that position.* I don't know how far the car was away from us. The two toots seemed to indicate danger, and Mrs. Cothary was struck at the same moment, and we never heard the street car coming." (R., pp. 29, 30, 32, 33, 34, 35.)

Anna Helander testified as follows:

"* * * I did not see any car in sight, so we crossed over and when we got up on the platform, the first thing we intended to go through, and could not; my husband was ahead and he says: 'It is stuck here, we cannot get through,' so I went to the other side and tried to jerk it loose. We thought we could jerk it loose, but could not, and so then the car came and struck her. The first I knew the car came was when it struck Mrs.

Cothary. I heard the whistle toot just as it struck her. There was no whistle blown before it struck her. I didn't hear any. I didn't hear any gong rung on the street car. At the time the car struck Mrs. Cothary I was standing on the left hand side, Exhibit B shows me in the picture on the other side with a cap or hood on and when the car struck Mrs. Cothary I stood right in between these cars looking towards the bathhouse, trying to get the turnstile loose. I didn't notice Mrs. Cothary at the same minute. *We were all three trying to jerk the turnstile loose. We didn't try so very long, I cannot just . . remember how long it was, but I know that we didn't stay there very long.* * * * It was daylight when we got to the platform, and we looked for a car before we crossed the track, and I walked on the track so I could meet the car on the outbound track. The others walked between the tracks, and from our position we could see a car coming towards us, one which might strike us. When we got to the platform my husband was ahead of us and started to push through the turnstile. Mrs. Cothary came right after him and I came after her. I think she was between us. We were right there together. At the time of the accident we were not on the track, we were all on the platform. The turnstile did not work. He turned and said that we cannot get through, we are stuck. Let us see if we can try to jerk it loose, so we did, all three of us. I went around to the left hand side. Mrs. Cothary was right in the middle. I didn't see her going to that position. She didn't need to move to take hold of the arms. Mrs. Cothary had to just step to the side of my husband, just a few

steps. We were all trying to get it loose. *I couldn't tell you the time, but we didn't stay there only long enough to try to get it loose.*" (R., pp.. 37, 38, 39.)

The complaint alleges that the car was exceeding an ordinance of the City of Tacoma which limited the speed of cars to twenty miles per hour, but during the trial it appeared that there was no ordinance limiting the speed of cars within the park limits, and the Court so instructed the jury, as shown in the Transcript of Record, page 95.

It will also be remembered that the provision of the ordinance hereinabove quoted provides for the maintenance of gates and turnstiles, as follows:

> "The said railway company shall construct and maintain a wire fence six feet high, with *suitable gates and turnstiles for the protection of the public in getting on or off the cars.*"

The Court instructed the jury in reference to the turnstile, as follows:

> "The Court instructs you that the question about this turnstile being too close to the track or its not working that you will disregard that as an allegation of negligence on the part of the defendant company."

This instruction was not excepted to by the defendants in error. There was no testimony introduced to show that the gate refused to work at any other time during the day on which the accident occurred. The motorman, Jackson, testified that the gate was in order during the day, and

the facts would indicate that undoubtedly the gate was being used by a large number of people in getting off of the street car, and going into the bathhouse.

Paul Jackson, the motorman in charge of the car, testified as follows:

> "* * * As I was going out of the first curve I noticed some people standing on the platform at the bathhouse. They did not look to be in any danger from where I was. The car went down with a slight application of air to steady the brakes, but *when I got within a car-length or two of the platform I noticed one lady was in danger, but when I saw she was in danger I threw the air over into the emergency* and did not have enough air to have much effect on the brakes, and when I saw it would not stop it in time I released the air and reversed the car. I blew the whistle two or three times as I was going into the first curve, and blew it again about a car-length from the time I hit the plaintiff. The brakes were in good condition and there was no means at my command by which I could have stopped the car sooner than I did. I think the gate struck the woman."

On cross examination he testified as follows:

> "Q. I understand your answer in answer to a question I put to you when you came out of this second curve that you saw Mrs. Cothary was in danger?"
>
> "A. Just when I got on to the straight track."
>
> "Q. And that is about 100 feet from the platform, is it not?"

"A. I could not say as to that."

"A. I applied the brakes as soon as I saw she was in danger and would be struck if she did not move."

"Q. You saw that she was in this position (illustrating) out towards the platform?"

"A. She was standing with her back to the tracks, yes, sir."

"Q. And Mr. Helander was in front of her to the right?"

"A. Yes, sir."

"Q. And Mrs. Helander was in front of her to the left?"

"A. Yes, sir."

"Q. And she was in close proximity to the track there?"

"A. Yes, she was closer to the track than either of the other two."

"Q. And so close that you could see that you were liable to hit her if she did not get out of the road?"

"A. Yes, sir."

"Q. And you saw that as you came around and out of this second curve?"

"A. I saw that as I was coming down on that straight track."

"Q. About how far away from her were you when you saw her condition?"

"A. A car length or a car length and a half."

"Q. Was it at that moment that you gave the whistle or before that or after that?"

"A. As soon as I saw she was in danger, that she would be struck by the car if she did not get out of the way."

"Q. At that moment you gave her the whistle?"

"A. I gave her the warning, yes, sir."

The uncontradicted testimony was that this platform was constructed and maintained only for persons getting off from the street car, going to the bathhouse, and on the inside of the fence next to the bathhouse was a sign telling intending passengers to take a pathway up to the loop to get on board the street cars. On Sundays the cars never stopped at the platform, except to let off passengers.

It will be remembered that the plaintiff in this instance was not a passenger, or even an intending passenger. The private right of way was enclosed by a wire fence, according to the provisions of the ordinance, and was so enclosed in an attempt to keep people off of the right of way, but in spite of this the evidence shows that it was frequently used by pedestrians going down to the bathhouse from the entrance of the park.

At the close of all the testimony plaintiff in error made a motion for a directed verdict, which was denied, and which is assigned as error.

The Court also permitted Mr. Helander to testify as to the condition he found the turnstile in one week after the accident without showing that the condition was the same then as at the time of the accident. The Court also permitted the defendants in error to attempt to impeach the testimony of Mr. Jackson without laying any grounds for introducing impeaching questions.

ASSIGNMENTS OF ERROR

I.

The Court erred in refusing to grant defendant's motion for a directed verdict upon each and every one of the grounds therein set forth. (R., pp. 80-1.)

II.

The Court erred in admitting the testimony of Oscar Helander over the objection of the defendant, as follows:

"Q. Did you find out while you were there what was the matter with the turnstile that you could not go?"

"A. No, sir, not until afterwards."

"Q. Well, afterwards; what did you find afterwards?"

Mr. OAKLEY: "I object to that question, unless he can tell when he found it, to see how near it is to the time."

Mr. TEATS: "Q. When was it?"

A. "Well, it was some time after the accident."

"Q. About how long after the accident?"

"A. I think it was about a week after the accident."

Mr. OAKLEY: "I object to that as being too remote."

The COURT: "Objection overruled; exception allowed. Only answer if you know from your own examination and observation, not from what somebody told you."

Mr. TEATS: "Q. What did you find?"

"A. I found one spoke of the turnstile was working almost against the other, or got down, or the whole turnstile had sunk down, rather, and that was the cause of the turnstile not going clear around."

III.

The Court erred in permitting the plaintiffs to read testimony of Paul Jackson given at a former trial of this cause for the purpose of impeachment, without laying proper grounds for impeaching questions, as follows, to-wit:

"Q. You were the length of two cars past the turnstile before your car stopped?"
"A. Yes, sir."
"Q. That is, the rear of your car was two lengths away from the turnstile?"
"A. About that."
"Q. That would be three times 45, or 135 feet after you passed the turnstile before you stopped your car?"
"A. From where I was?"
"Q. Yes."
"A. It would be around that some place."

ARGUMENT

PLAINTIFF IN ERROR CONTENDS THAT THE DEFENDANT IN ERROR WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN SUCH A MANNER AS TO PRECLUDE A RECOVERY IN LAW, IN WALKING IN FRONT OF THE TURNSTILE AND PLACING HERSELF TOO NEAR TO THE TRACK, DIRECTLY IN FRONT OF AN APPROACHING STREET CAR.

This case was tried in the Superior Court of the State of Washington, for Pierce County, and after trial thereof a judgment of non-suit was entered, whereupon this case was started in the

United States District Court, from which this Writ of Error is prosecuted.

In the statement of the case hereinabove set forth, testimony material to the determination of the questions involved has been called to the Court's attention, and we will not repeat the same to any great extent. The facts involved are not complicated nor disputed. If we accept defendant in error's version of how the accident happened we find that upon arriving at the platform she immediately went to the turnstile and attempted to pass through to the bath house; at this time they were all in a place of safety, none of them being near the tracks. When the turnstile failed to work, they stepped back. Mrs. Helander had to pass around the arm of the turnstile to the left, and Mrs. Cothary had to take just a few steps to get to the position where she was struck, as shown in Exhibit B. She testified:

> "And very soon after I got in that position I was struck * * * We didn't wait at all. I was there for just a short time. I was expecting to go right through the gate, and did not look back again. * * * I didn't pay any attention to the distance that my body was from the railroad track, as I stood there, because I expected to go through the gate; I was there a very short time. We were not pushing very long when it occured." (R., pp. 23-26.)

Oscar Helander, who has been a fireman on a locomotive for ten years, testified that Mrs. Cothary

got in front of the turnstile, and his wife went over to the left of her, and

> "The moment we got together there the car came. I heard a whistle, and the same moment it struck her. After we got to the platform we didn't look to see whether there was a car coming." (R., pp. 29-30.)

Also:

> "She had not been there more than a moment before the car struck her. She didn't keep that same position any more than a second, I suppose; just as she got there." (R., p. 34.)

Also:

> "I heard two toots of the whistle just about the time she was struck, and it was just a short time before that she walked to that position." (R., p. 34.)

It was proven by several witnesses that the car whistled at different times going into and down through the park. (R., pp. 44, 45, 62.) The motorman also testified that he blew the whistle two or three times on his way down from the entrance to the park to the place of the accident, which was only a short distance.

We submit to the Court that these facts show conclusively that she stepped from a place of safety on the platform to a point too near the tracks and directly in front of the street car, without regard to her own safety, or as she testified:

> *"I didn't pay any attention to the distance that my body was from the railroad track as I stood there, because I expected to go through the gate."*

We can scarcely conceive of facts which could more clearly constitute contributory negligence.

We will concede that defendant in error was a licensee, and the rule of law as laid down by this Court in *Northern Pacific Ry. Co. v. Jones*, 144 Fed. 47 fixes the degree of care of plaintiff in error to be that of exercising reasonable precautions to avoid injuring her.

This Court in the above case held that the District Court was in error in refusing to grant a directed verdict in the case where a man in the full possession of his faculties was injured while walking along a railroad track as a licensee, by being struck by a locomotive negligently operated, without exercising his faculties of sight or hearing to protect himself. This Court therein said:

> "Assuming that the evidence which went to the jury proves that the railroad company was negligent in not discovering the presence of the defendant in error on its track, what shall be said of the evidence of the contributory negligence of the defendant in error? A general license to the public to walk upon a railroad track does not mean that the railroad company is to be the insurer of the safety of all persons who avail themselves of that permission. While the license adds to the responsibilities of the railroad company, and imposes upon it a greater burden of care, it does not affect the duty that rests upon the licensee to take all due precautions to avoid injury to himself. If the negligence of the defendant in error was one of the proximate causes of the injury which he sus-

> tained, if it directly contributed to the unfortunate result, he cannot recover, even though the negligence of the plaintiff in error contributed to it; and the rule is the same whether the injured person be a trespasser on the railroad track or a licensee. *Kansas City, Ft. S. & M. R. Co. v. Cook*, 66 Fed, 115, 13 C. C. A. 364, 371, 28 L. R. A. 181; *Felton v. Aubrey*, 74 Fed. 350, 360, 20 C. C. A. 436; *Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361; *Louisville & N. Ry. Co. v. McClish*, 115 Fed. 268, 273, 53 C. C. A. 60; *King v. Illinois Central R. R. Co.*, 114 Fed. 855, 862, 52 C. C. A. 489; *Missouri Pacific Railroad Co. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641, 645.

In *Morgan v. N. P. Ry. Co.*, 196 Fed. 449, this Court held that a pedestrian, who as a licensee was walking on a railroad track on a dark and windy night, in stepping from a place of safety on a beaten path between the tracks to a position between the rails, where he was killed by a train approaching from the rear, was guilty of contributory negligence.

In *Kaiser v. N. P. Ry. Co.*, 203 Fed. 933, the Court held a pedestrian guilty of contributory negligence in walking through a railroad yard, along a path, and then leaving the path, and walking along close to another track, where he was struck by an overhanging cross-beam of an engine. In the above case the Court said:

> "That he was a prospective passenger, and therefore rightfully upon the company's property, can make no difference. The rule

applies to trespasser and licensee alike. Neither is absolved from the exercise of care to avoid known impending danger commensurate with the imminence of that danger. Here the plaintiff, although aware of the approach of an engine in a yard used for switching in the breaking and making of trains, deliberately turned his back upon it, and invited the injury which he speedily suffered. He was not between the rails of the track, but upon a path beside the track, which afforded ample space within which to walk without injury from passing engines and cars. His companion and others were passed by this same engine without injury. The plaintiff heedlessly walked so close to the rails that he came within reach of the usual overhang or crossbeam. Here, again, his negligence is apparent, and was the primary and efficient cause of the injury.

"The failure to ring the bell or blow the whistle of the engine was, at most, concurring or succeeding negligence, which failed to prevent the natural consequences of plaintiff's carelessness, but was not of itself such negligence as would render defendant liable. Ordinary care required that he be alert in the use of his senses of sight and hearing to guard himself from harm, and no reliance on the exercise of care by persons in control of engines or trains can excuse his failure to exercise such care. The plaintiff had been long and constantly familiar with the conditions there existing. There is no claim that defendant's servants saw him and ran him down wantonly and recklessly. He was walking, not upon, but beside the track, and presumed to be conscious of his situation and mindful of his safety. This, and other

> Courts, have dealt so fully and conclusively with every principle of law here presented for consideration, that further elaboration is felt to be unnecessary. *Missouri Pacific Ry. Co. v. Mosely*, 6 C. C. A. 641, 57 Fed. 921; *Kansas City, Ft. S. & M. R. Co. v. Cook*, 13 C. C. A. 364, 66 Fed. 115, 28 L. R. A. 181; *Garlich v. Northern Pac. Ry. Co.*, 67 C. C. A. 237, 131 Fed. 837; *St. Louis & S. F. R. Co. v. Summers*, 97 C. C. A. 328, 173 Fed. 358; *Hart v. Northern Pac. Ry. Co.*, 116 C. C. A. 12, 196 Fed. 180."

In this case defendant in error suddenly left a place of safety and placed herself within reach of an approaching car, which struck her within a moment after she got there. "She had not been there more than a moment before the car struck her; just about the time she got there the car struck her," and it is undisputed that: "*I heard two toots of the whistle just about the time she was struck, and it was just a short time before she was struck.*" (R. p. 34.) Surely it cannot be said that the motorman should have anticipated that she would suddenly step out near the track, but the law is that he had a right to assume that she would not do so. This is too clear to require any citation of authorities.

The following cases, in addition to those above cited, sustain our contention that Mrs. Cothary was guilty of contributory negligence:

Imler v. Northern Pacific Ry. Co., 47 Wash. Pac. 354, (Feb. 7, 1916).

Gannaway v. Puget Sound T. L. & P. Co., 77 Wash. 655, 138 Pac. 267;
Mey v. Seattle Electric Co., 47 Wash. 497, 92 Pac. 283;
Kiely v. Seattle Electric Co., 78 Wash. 396, 139 Pac. 197;
State, etc., et al v. Cumberland & W. Electric Ry. Co., 68 Atl. 197;
Bailey v. Market Street Cable Ry. Co., 42 Pac. 914;
Hafner v. St. Paul City Ry. Co., 75 N. W. 1048;
Jager v. Coney Island & B. R. Co., 32 N. Y. S. 304;
Atchison T. & S. F. Ry. Co. v. Schwindt, 72 Pac. 573;
South Covington, etc., Co. v. Beese, 108 S. W. 848, 16 L. R. A. (N. S.) 890;
Bryant v. Boston Elevated Ry. Co., 98 N. E. 587;
Garvey v. Rhode Island Co., 58 Atl. 456;
Hayden v. Fair Haven, etc., Ry. Co., 56 Atl. 613;
Widener v. West End St. Ry. Co., 32 N. E. 899;
Ellsberg v. Honeck, 68 Atl. 1091;
Wood v. Omaha & Council Bluffs Street Railway Co., 120 N. W. 1121;
Townsend v. Houston Electric Co., 154 S. W. 629;
Smith v. Guff, etc., Ry. Co., 128 S. W. 1177;
Engler v. International Ry. Co., 122 N. Y. S. 841.

In view of the undisputed facts that Mrs. Cothary was in a place of safety up till a moment before she was struck by the car, and that the motorman, according to all of the witnesses, blew the whistle just before striking her, it cannot be said that the plaintiff in error did not exercise ordinary care after Mrs. Cothary placed herself in a position of danger, and we submit to the Court that her conduct constituted contributory negligence, which bars a recovery in this case.

ASSIGNMENT II.

The Court erred in admitting the testimony of Oscar Helander over the objection of the defendant relative to the condition of the turnstile about a week after the accident, without any additional proof that no change had taken place in the meantime, as follows:

> "* * * I didn't find out what was the matter with the turnstile when I was there, but afterwards."
>
> Q. Well, afterwards, what did you find afterwards?"
>
> Mr. OAKLEY: "I object to that question, unless he can tell when he found it, to see how near it is to the time."
>
> Mr. TEATS: Q. "When was it?"
>
> A. "Well, it was sometime after the accident."
>
> Q. "About how long after the accident?"
>
> A. "I think it was about a week after the accident."

Mr. OAKLEY: "I object to that as being too remote."

The COURT: "Objection overruled; exception allowed. Only answer if you know from your own examination and observation, not from what somebody told you."

Mr. TEATS: Q. "What did you find?"

A. "I found one spoke of the turnstile was working almost against the other, or got down, or the whole turnstile had sunk down, rather, and that was the cause of the turnstile not going clear around." (R., pp. 31-'2.)

The testimony shows that the turnstile had been used by passengers of the street railway company during the entire day on which the accident occured, also that the turnstile was maintained only for the use of passengers getting off the street car at that point. There was no testimony to show that the turnstile failed to work on the day in controversy, except in this particular instance.

In rebuttal plaintiff in error showed that the turnstile was in perfect condition on August 1st, a short time following the accident. (R., p. 66.)

The great weight of authority is to the effect that in actions of this character evidence as to the condition of the instrumentality causing the accident at a time subsequent to the accident is inadmissible unless supported by proof that no change had taken place in the meantime.

The Edwin, 87 Fed. 540;

Brentner v. Chicago, etc., R. Co., 58 Ia. 625, 12 N. W. 615;
Hoyt v. City of Des Moines, 76 Ia. 430, 41 N. W. 63;
Sullivan v. City of Syracuse, 29 N. Y. S. 105;
Welsh v. Murray, 37 N. Y. S. 882;
City of Chicago v. Early, 104 Ill. App. 398;
Merchant's Loan & Trust Co. v. Boucher, 115 Ill. App. 101.

In the above cases the interval lapsing between the date of the accident and date of inspection was approximately the same time, or a shorter interval, than that in the present instance.

ASSIGNMENT III.

The Court permitted defendants in error to read certain questions and answers from the testimony of the motorman Paul Jackson on one of the former trials of this case, over the objection of the plaintiff in error. The matter referred to is set out fully under the third assignment of error hereinbefore set forth in this brief, and we will not set out the matter in detail again. On pages 49 and 50 of the record is a full proceeding of what occurred while Jackson was on the stand, and on pages 76 to 80 of the record are the full proceedings at the close of the trial, when the testimony as given by Jackson at the former trial was read. It will be observed that nothing in the testimony of Jackson while on the witness stand justified the reading of the testimony during the former trial. The questions read

from his former testimony in no manner tended to change or qualify the testimony he had given during the last trial. The testimony could not have been given for the purpose of impeachment, and if it was so intended no grounds for impeachment were laid.

We therefore submit to the Court that the judgment of the trial court should be reversed and an order made directing the Court to grant the motion for directed verdict, and in case of the failure of this Court to so order, a new trial should be granted.

Respectfully submitted,

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